90-425

No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BILL ARMONTROUT, Warden
Missouri State Penitentiary,
Petitioner,

vs.

JAMES W. CHAMBERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE STATUTORY PRESUMPTION OF CORRECTNESS TO BE APPLIED TO STATE COURT FINDINGS OF FACT, 28 U.S.C. § 2254(D), PROHIBITS FEDERAL COURTS IN HABEAS CORPUS CASES FROM RE-CHARACTERIZING AN ATTORNEY'S PERFORMANCE UNDER *STRICKLAND V. WASHINGTON* AS A FAILURE TO INVESTIGATE, WHERE THE STATE COURTS CHARACTERIZED THE PERFORMANCE AS DELIBERATE TRIAL STRATEGY.

II.

WHETHER AN ATTORNEY CAN BE FOUND TO HAVE RENDERED CONSTITUTIONALLY-DEFICIENT ASSISTANCE WHERE, FOLLOWING HIS APPOINTMENT FOR A RETRIAL AFTER REVERSAL, AND AFTER STUDYING THE TRANSCRIPT OF THE FIRST TRIAL, HE DECIDED NOT TO CALL AS A WITNESS AN INDIVIDUAL WHOSE TESTIMONY THE ATTORNEY BELIEVED WOULD, ON BALANCE, HELP ESTABLISH, RATHER THAN CHALLENGE, THE PROSECUTION'S CASE.

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OPINIONS BELOW

The panel Opinion of the United States Court of Appeals ordering the respondent to be retried or released is reported at 885 F.2d 1318 (8th Cir. 1990) (A-30). The *en banc* opinion is not reported but is included in the Appendix (A-2). The Judgment and Order of the district court also is not reported but is included in the Appendix (A-53).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its en banc Opinion on July 5, 1990 (A-2). Pursuant to 28 U.S.C. §2201(c) and Supreme Court Rule 20, the present petition for a writ of certiorari was required to be filed within ninety

days. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Respondent was convicted of capital murder for which he was sentenced to death. On direct appeal following the original trial, the Missouri Supreme Court reversed the conviction for failure to submit a self-defense instruction and remanded for a new trial. *State v. Chambers,* 671 S.W.2d 781 (Mo. banc 1984).

On retrial, respondent did not present a witness, Jim Jones, who had testified at the first trial in support of the self-defense theory. The trial court refused a tendered self-defense instruction. Again the respondent was convicted and sentenced to death. The Missouri Supreme Court upheld the conviction and sentence on direct appeal. *State v. Chambers,* 714 S.W.2d 527 (Mo. banc 1986).

Respondent then sought post-conviction relief pursuant to Missouri Supreme Court Rule 27.26 (repealed effective 1-1-88). The motion court denied relief on the respondent's claims of ineffective assistance of counsel. On appeal, the Missouri Court of Appeals affirmed, finding "that counsel's investigation of potential witness . . . Jones . . . was reasonable under the circumstances and constituted deliberate trial strategy, not a failure to investigate." The court found as follows:

> Counsel had the benefit of Jones' recorded testimony from the first trial. Jones' testimony on cross-examination directly supported the State's theory of the case under the capital murder submission. In counsel's professional opinion the disadvantages of Jones' testimony outweighed the advantages. Appellant assented to this trial strategy and signed a statement attesting to this fact. Counsel felt no need to individually interview Jones as any deviation in Jones' testimony from that given at the first trial would have been subject to impeachment.

Chambers v. State, 745 S.W.2d 718, 721-22 (Mo.App. 1987).

Respondent next filed a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. §2254 on March 23, 1988, in the United States District Court for the Eastern District of Missouri. On July 19, 1988, District Judge William L. Hungate denied the petition, finding in pertinent part as follows:

> The Court finds reasonable counsel's conclusion that Jones' testimony would have tended to support the state's theory of the case and thus his decision not to call Jones as a witness. This is especially true in view of petitioner's written and signed pretrial statement that he agreed with counsel's decision in this regard . . . Furthermore, counsel reasonably assessed the [e]ffect to Jones' earlier testimony on both the state's theory of the case and Jones' credibility as a witness.

(A-62-63).

The Eighth Circuit Court of Appeals reversed, finding counsel ineffective for failing to interview and call Jim Jones as a defense witness. *Chambers v Armontrout,* 885 F.2d 1318 (8th Cir. 1989). Petitioner then filed a petition for rehearing en banc. The petition was granted. Following briefing and argument, the Court of Appeals ruled, on a 6-5 vote, that counsel was ineffective for failing to interview and call Jim Jones as a defense witness (A-2). The court granted the petitioner's motion for a stay of mandate pending this petition for a writ of *certiorari.* (A-1)

ARGUMENT

I.

THE STATUTORY PRESUMPTION OF CORRECTNESS TO BE APPLIED TO STATE COURT FINDINGS OF FACT, 28 U.S.C. §2254(D), PROHIBITS FEDERAL COURTS IN HABEAS CORPUS CASES FROM RE-CHARACTERIZING AN ATTORNEY'S PERFORMANCE UNDER *STRICKLAND V. WASHINGTON* AS A FAILURE TO INVESTIGATE, WHERE THE STATE COURTS CHARACTERIZED THE PERFORMANCE AS DELIBERATE TRIAL STRATEGY.

The central issue in the instant petition concerns the decision of trial counsel, appointed for a new trial after reversal,[1] upon studying the transcipt of the first trial, not to call a witness whose testimony counsel believed would, on balance, serve to establish, rather than challenge, the prosecution's case. The Missouri Court of Appeals characterized counsel's decision as "deliberate trial strategy, not a failure to investigate." *Chambers v. State,* 745 S.W.2d 718, 722 (Mo.App. 1987), (A-112). However, without addressing the statutorily-mandated presumption of correctness, 28 U.S.C. §2254(d), the United States Court of Appeals for the Eighth Circuit found that

> The decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial.

Chambers v. Armontrout, No. 88-2382 (8th Cir. July 5, 1990) (en banc), (A-8). Petitioner submits that the court's failure to apply the presumption of correctness to the facts of this case requires reversal.

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[1] *See State v. Chambers,* 671 S.W.2d 781 (Mo. banc 1984), (A-126).

Ineffective assistance of counsel is a mixed question of fact and law. *Strickland v. Washington,* 466 U.S. 668, 698 (1984); *Couch v. Trickey,* 892 F.2d 1338, 1341 (8th Cir. 1989). A state court's *conclusion* regarding ineffectiveness is subject to *de novo* review in federal *habeas corpus* proceedings. *Strickland v. Washington, supra* at 698; *Couch v. Trickey, supra* at 1341. *See also, Laws v. Armontrout,* 863 F.2d 1377, 1381 (8th Cir. 1988) (en banc), *cert. denied,* ____ U.S. ____, 109 S.Ct. 1944, ____ L.Ed.2d ____ (1989). However, state court findings of *fact* on this issue are presumed correct absent specific enumerated circumstances rendering the presumption suspect. 28 U.S.C. §2254(d); *Strickland v. Washington, supra* at 698; *Sumner v. Mata,* 449 U.S. 539, 543-47 (1981); *Couch v. Trickey, supra* at 1341; *Laws v. Armontrout, supra* at 1381.

The standards governing claims of ineffective assistance of counsel are familiar and straightforward:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, supra at 687; *Laws v. Armontrout, supra* at 1386. Each prong of this test presents a mixed question of fact and law. *Strickland v. Washington, supra* at 698; *Couch v. Trickey, supra* at 1341. n. 13.

The performance prong logically consists of three elements:

(1) a finding as to *what* the attorney did nor did not do;

(2) a finding as to *why* the attorney acted or failed to act; and

(3) an objective determination as to the *reasonableness* of the act or omission.

The first element obviously serves to establish "that counsel's performance was deficient." *Strickland v. Washington, supra* at 687. The second element establishes whether or not the act or omission was motivated by trial strategy. *Id.* at 689. *See also Swindler v. Lockhart,* 885 F.2d 1342, 1352 (8th Cir. 1989), *cert. denied,* ____ U.S. ____, 110 S.Ct. 1938, ____ L.Ed.2d ____ (1990). The third element applies the Sixth Amendment[2] "counsel" requirement to the first two elements of the performance prong. *Strickland v. Washington, supra* at 687-90.

The Court of Appeals' re-characterization of counsel's performance as failure to investigate involves the second element of the performance prong, i.e., a finding as to counsel's reasons for a particular act or omission. This requires consideration of counsel's intent or motivation.

While this Court does not appear to have addressed the issue directly, petitioner submits that the Missouri Court of Appeals' characterization of counsel's performance as "deliberate trial strategy, not a failure to investigate[,]" *Chambers v. State,* 745 S.W.2d at 722, (A-112) is a finding of fact subject to the presumption of correctness, 28 U.S.C. §2254(d). *See Washington v. Strickland,* 693 F.2d 1243 (11th Cir. 1982) (en banc), *rev'd,* 466 U.S. 668 (1984):

> A finding by the district court as to whether a choice was strategic is a finding of fact that will be accepted by the court of appeals unless clearly erroneous.

Id. at 1257 n. 24, citing, *inter alia, Pullman-Standard v. Swint,* 456 U.S. 273, 287-90 (1982). *See also, Adams v. Jago,* 703 F.2d 987, 980 (6th Cir. 1983). Because the stategy element of the per-

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[2] The Sixth Amendment provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI.

formance prong requires discerning an attorney's motivation or intent, such a determination is analogous to findings regarding intentional discrimination and credibility, both of which are matters of fact. *Batson v. Kentucky,* 476 U.S. 79, 98 n. 21 (1986); *Marshall v. Lonberger,* 459 U.S. 422, 433-34 (1983).

This Court dealt specifically with the presumption of correctness, 28 U.S.C. §2254(d), in *Sumner v. Mata,* 449 U.S. 539 (1981) (*Sumner* I). The underlying claim in *Sumner* I involved allegedly suggestive pre-trial identification procedures. *Id.* at 541-42. After the district court denied the petition for a writ of *habeas corpus,* the Ninth Circuit Court of Appeals reversed based upon "findings . . . considerably at odds with the findings made by the California Court of Appeals." *Id.* at 543. There was no suggestion that the record was insufficient in any respect. *Id.*

In reversing that judgment, this Court noted that the

> . . . interest in federalism recognized by Congress in enacting [28 U.S.C.] §2254(d) requires deference by federal courts to factual determinations of all state courts. This is true particularly in a case such as this where a federal court makes its determination based on the identical record that was considered by the state appellate court.

Id. at 547. The Court found that in enacting the presumption of correctness, Congress intended to reduce the friction between the federal and state systems inherent in 28 U.S.C. §2254, and "to ensure that a state finding not be overturned merely on the basis of the usual 'preponderance of the evidence' standard[.]" Consequently, this Court held

> . . . that a habeas court should include in its opinion granting the writ the reasoning that led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was "not fairly supported by the record."

Id. at 551.

Upon remand for consideration in light of the statutory presumption, the Ninth Circuit held the presumption of correctness inapplicable to mixed questions of fact and law, and "argued that its disagreement with the state court was 'over the *legal and constitutional significance* of certain facts' and not over the facts themselves." *Sumner v. Mata,* 455 U.S. 591, 596 (1982) (*Sumner* II), emphasis in original. This Court disagreed:

> . . . [T]he statute . . . require[s] the federal courts to face up to any disagreement as to the facts and to defer to the state court unless one of the factors lised in §2254(d) is found. Although the distinction between law and fact is not always easily drawn, we deal here with a statute that requires the federal courts to show a high measure of deference to the factfinding made by the state courts. To adopt the Court of Appeals' view would be to deprive this statutory command of its important significance.

Id. at 597-98. Again the court remanded the case for further proceedings. *Id.* at 598.

The case at bar presents a situation virtually identical to that in *Sumner v. Mata.* As in that case, ineffective assistance of counsel is a mixed question of fact and law. *Strickland v. Washington, supra* at 698. Moreover, there is sharp disagreement between the Missouri Court of Appeals and the Eighth Circuit Court of Appeals as to the characterization of defense counsel's performance.

The Missouri Court of Appeals found as follows:

> Counsel had the benefit of Jones' recorded testimony from the first trial. Jones' testimony on the cross-examination directly supported the State's theory of the case under the capital murder submission. In counsel's professional opinion the disadvantages of Jones' testimony outweighed the advantages. Appellant assented to this trial strategy and

> signed a statement[3] attesting to this fact. Counsel felt no need to individually interview Jones as any deviation in Jones' testimony from that given at the first trial would have been subject to impeachment . . . We agree with the [post-conviction] motion court that counsel's investigation of potential witness . . . Jones . . . was reasonable under the circumstances and constituted deliberate trial strategy, not a failure to investigate.

Chambers v. State, 745 S.W.2d at 721-22, (A-111-112). The Court of Appeals, without discussing the presumption of correctness in the majority opinion,[4] re-characterized counsel's performance:

> The decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial.

Chambers v. Armontrout, supra, A-8.

Having re-characterized counsel's performance, the Court of Appeals proceeded to hold counsel ineffective for failing to interview Jones, failing to call Jones at trial, and failing to call Jones at sentencing. *Chambers v. Armontrout, supra,* A-2-3. The re-characterization virtually compelled the ineffectiveness determination.[5] By ignoring the fact that defense counsel had

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[3] The text of the statement appears in the Eighth Circuit opinion, *Chambers v. Armontrout, supra,* A-12 n. 8.

[4] Indeed, the opinion does not refer to the "clearly erroneous" standard by which the Court was obliged to review the district court's finding that counsel acted strategically. *Washington v. Strickland, supra* at 1257 n. 24.

[5] Indeed, the Court admitted as much:

> Hager's decision not to call Jones thus is only as reasonable as Hager's decision not to interview Jones. That decision amounted to ineffective assistance of counsel.

Chambers v. Armontrout, supra, A-13.

the benefit of the transcript of the previous trial and, on that basis, made a strategic decision not to call Jones, the Court in effect treated the situation as an original trial rather than a re-trial.

In doing so, however, the Court eliminated a crucial portion of the totality of the circumstances, in view of which courts must analyze ineffectiveness claims. *Strickland v. Washington, supra* at 688, 690. Obviously, a defense attorney in an original trial must interview witnesses and conduct discovery in order to ascertain the nature and strength of the State's case, as well as to establish possible defenses. *Kimmelman v. Morrison,* 477 U.S. 365, 387 (1986). The availability of the transcript from an earlier trial, which counsel studied prior to his decision not to call Jones, offered a "unique procedural posture" that "provided [defense counsel] with the 20/20 hindsight to know that [Jones' testimony] had little, if any, effect on the jurors' deliberations." *Bell v. Lynaugh,* 828 F.2d 1085, 1090 (5th Cir.), *cert. denied,* 108 S.Ct. 310 (1987). The Court of Appeals, in re-characterizing counsel's performance, omitted this crucial element. Its ineffectiveness analysis was therefore flawed.[6]

Petitioner submits that the re-characterization of counsel's performance constitutes a violation of the presumption of correctness, 28 U.S.C. §2254(d), and that the Court thereby exceeded its jurisidiction. *Sumner* I, *supra* at 547 n. 2. Accordingly, certiorari should be granted.

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[6] The Court's re-characterization of counsel's performance resulted in a failure to defer to counsel's reasonable strategy. *See Chambers v. Armontrout, supra,* A-14.

II.

AN ATTORNEY CANNOT BE FOUND TO HAVE RENDERED CONSTITUTIONALLY-DEFICIENT ASSISTANCE WHERE, FOLLOWING HIS APPOINTMENT FOR A RETRIAL AFTER REVERSAL, AND AFTER STUDYING THE TRANSCRIPT OF THE FIRST TRIAL, HE DECIDED NOT TO CALL AS A WITNESS AN INDIVIDUAL WHOSE TESTIMONY THE ATTORNEY BELIEVED WOULD, ON BALANCE, HELP ESTABLISH, RATHER THAN CHALLENGE, THE PROSECUTION'S CASE.

The standards for evaluating claims of ineffective assistance of counsel are by now commonplace:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. The reviewing "court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. "At the same time, the court should recognize that counsel is strongly presumed to have ren-

dered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*[7]

As for the prejudice prong of the *Strickland* test,

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Id. at 694.[8]

Under 28 U.S.C. §2254(d), state court findings of facts on this issue are presumed correct.[9] *Strickland, supra* at 698; *Couch v. Trickey,* 892 F.2d 1338, 1341 (8th Cir. 1989); *Laws v. Armontrout,* 863 F.2d 1377, 1386 (8th Cir. 1988) (en banc), *cert. denied,* ____ U.S. ____, 109 S.Ct. 1944, ____ L.Ed.2d ____ (1989). District court findings are governed by the "clearly erroneous" standard. *Strickland, supra* at 698; Fed.R.Civ.P. 52(a). The legal conclusions are subject to *de novo* review. *Couch v. Trickey, supra* at 1341.

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[7] The court in *Strickland* also warned that "availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation encourage[s] the proliferation of ineffective challenges." *Strickland, supra* at 690. We are long past the warning stage. It is a rare petition indeed that does not contain several allegations of ineffective assistance.

[8] The Eighth Circuit Court of Appeals reiterated these standards in *Couch v. Trickey,* 892 F.2d 1338, 1342-43 (8th Cir. 1989) and *Laws v. Armontrout,* 863 F.2d 1377, 1386-87 (8th Cir. 1988) (en banc), *cert. denied,* 109 S.Ct. 1944 (1989).

[9] Credibility determinations are findings of fact and are presumed correct. *Marshall v. Lonberger,* 459 U.S. 422, 433-34 (1983).

Petitioner submits that the Eighth Circuit Court of Appeals misapplied these standards in several important respects. Consequently, certiorari should be granted.

First, the Court of Appeals implicitly adopted at least two *per se* rules governing counsel's performance in spite of this Court's warning against doing so. *See Strickland, supra* at 688-89. As discussed above, the Court of Appeals re-characterized counsel's decision, upon reading the transcript of the previous trial, not to call a certain witness as a failure to investigate. *Chambers v. Armontrout,* No. 88-2383 (8th Cir. July 5, 1990) (en banc), (A-8). In addition to constituting a violation of the presumption of correctness, 28 U.S.C. §2254(d), the re-characterization amounts to a *per se* rule that counsel upon retrial may not make strategic decisions based upon his or her reading of the transcript. Rather, in order to avoid being found ineffective,[10] counsel must expend scarce resources tracking down leads[11] in hope of finding and establishing the all-important affirmative defense, even though it may, on balance, serve to promote, rather than to challenge, the prosecution's case.

This leads to the second implicit *per se* rule. The Court's decision carries with it the assumption that where an affirmative defense arguably is available, even though it may be potentially harmful to the defendant's case, a decision to defend by holding the prosecution to its burden of proof is deficient. Petitioner submits that this Court rejected such a view of ineffectiveness in

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[10] Petitioner submits that the inevitable result of the Eighth Circuit's decision will be for counsel to cease functioning as a counsel for the defendant and to focus instead on protecting his or her own interests. *Strickland* was supposed to prevent such a shift in focus. *Strickland, supra* at 689-90.

[11] This becomes particularly problematic in cases where, as here, the defendant has sent counsel after false leads. *Chambers v. State,* 745 S.W.2d 718, 722[7] (Mo.App. 1987), (A-112).

United States v. Cronic, 466 U.S. 648, 656 n. 19 (1984). The Fifth Circuit Court of Appeals clearly recognized "simply putting the government to its proof" as a "plausible line of defense" in *Washington v. Strickland,* 693 F.2d 1243, 1252[9] (5th Cir. 1982), *rev'd,* 466 U.S. 668 (1984). Respect for counsel's independence makes a *per se* rule to the contrary unadvisable at best.

To the extent that the Court of Appeals has adopted new *per se* rules of law,[12] the decision also violates *Teague v. Lane,* 489 U.S. ____, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). In *Teague,* this Court held that federal courts in *habeas corpus* cases may not announce new rules of law and apply them retroactively unless they fall within one of two narrow exceptions. *Id.,* 109 S.Ct. at 1069-78. Unless this Court overturns *Strickland's* refusal to adopt *per se* guidelines for ineffectiveness claims, *Strickland, supra* at 688-89, the new rules cannot be applied retroactively.

Second, the Eighth Circuit substituted its own version of the facts in violation of the presumption of correctness, 28 U.S.C. §2254(d). The most obvious instance of this is the re-characterization of counsel's performance as discussed above. In addition, the Court evidently adopted a view of the facts stated by a dissenting judge on direct appeal.

In its conclusion, the Court of Appeals stated that "[a]t the time of the second trial, this case appeared to involve a barroom brawl or altercation." *Chambers v. Armontrout, supra,* A-18. On direct appeal, dissenting Missouri Supreme Court Judge Welliver wrote that "[t]his is an ordinary barroom altercation" and that he could not therefore impose the death penalty. *State v. Chambers,* 714 S.W.2d 527, 534 (Mo. banc 1986), Welliver, J., dissenting.

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[12] The test for a new rule is whether the outcome is subject to debate among reasonable minds. *Butler v. McKellar,* ____ U.S. ____, 110 S.Ct. 1212, 1217-18, ____ L.Ed.2d ____ (1990).

The majority opinion, in adopting this version of the facts, ignored the fact that the jury rejected it in the first trial, *see State v. Chambers,* 671 S.W.2d 781 (Mo. banc 1984), and that the Missouri Supreme Court rejected it after the second trial.[13] In effect, the Court of Appeals created a radical discontinuity between facts inside the bar and facts outside the bar. Such an approach violates the presumption of correctness.

Third, in addition to its re-characterization of counsel's performance, the Court of Appeals erred in applying the prejudice prong of the *Strickland* test:

> Had Jones testified, a self-defense instruction would have been submitted to the jury[14] and Hager would have been permitted to argue self-defense. The jury might have acquitted Chambers of capital murder, either by finding him guilty of a lesser charge[15] or by finding that he acted in self-defense.

Chambers v. Armontrout, supra, A-16-17. The first proposition was refuted in the previous trial where the jury, with the "benefit" of Jones' testimony, had the opportunity to convict

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[13] "There is simply no evidence in the record to support the conclusion that defendant was not the initial aggressor *or that he did not provoke the entire series of deadly events from the time he entered the bar. . . .*" *State v. Chambers,* 714 S.W.2d at 531, emphasis added.

[14] This is an unwarranted assumption in view of the difference in the evidence regarding the size of the victim and the discussion of the respondent's actions inside the bar. *State v. Chambers,* 714 S.W.2d at 530-31.

[15] The Court did not explain how a self-defense instruction would affect a lesser charge.

on a lesser charge, but refused to do so.[16] *State v. Chambers,* 671 S.W.2d at 782, (A-126). The second proposition is mere speculation and is insufficient under *Strickland.* As noted above, it assumes that a self-defense instruction would have been given. There is little room in the Missouri Supreme Court's opinion for such speculation. *State v. Chambers,* 714 S.W.2d at 530-31, (A-117-119). *Strickland* requires the defendant to show a reasonable *probability* that the result would have been different. *Strickland, supra* at 694. At best, the majority opinion demonstrates a *conceivable effect* upon the result.

Fourth, the majority decision fails to take into account the effect of Jones' testimony on the jury.[17] In his well-reasoned and thorough dissent, Circuit Judge John R. Gibson noted that "a professional evaluation of the testimony's trial impact involves considering it in the light the jury would consider it." *Chambers v. Armontrout, supra,* A-25, Gibson, J., dissenting. Further, Judge Gibson disagreed with the majority's determination that Jones' testimony could not be harmful to the defense because it was "cumulative":

> Jones was the only witness who saw the whole incident outside the bar. [Counsel], when evaluating the probable impact of Jones' testimony on the jury, could have reason-

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[16] The same instructions were submitted in the second trial. *See* Appendix at 133-45. Moreover, in view of the instructions given during the penalty phase, A-146-51, in which it was clear that the jury was not required to recommend the death penalty even if the aggravating circumstances outweighed the mitigating circumstances, A-151, Instr. 21, any suggestion of prejudice under *Strickland* is tenuous at best.

[17] This is particularly true of the relationship between Jones' testimony and that of a State's witness, Fred Ieppert. As Judge Gibson pointed out, Jones' testimony would have undercut the beneficial portion of Ieppert's testimony. *Chambers v. Armontrout, supra,* A-26, at 26, Gibson, J., dissenting.

> ably concluded that Jones' testimony would drive the damaging points home to the jury. That strategic decision is one that must be viewed from the testimony's impact on the jury, because we are here deciding how the jury's verdict would have been affected.

Id. at A-25-26.

Judge Gibson's view of *Strickland* is correct. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the *factfinder* would have had a reasonable doubt respecting guilt." *Strickland, supra* at 695, emphasis added. With all due respect, the Eighth Circuit Court of Appeals is not the factfinder at issue.

Fifth, the majority's substitution of facts and recharacterization of counsel's performance caused it to discount the fact that respondent signed a statement, a month before trial, assenting to the decision not to call Jones as a witness. *Chambers v. Armontrout, supra,* A-12 n. 8. According to the majority, "the statement indicates only that a defendant with an eighth grade education, relying on information provided by Hager, agreed with Hager's decision not to call Jones." A-13. The majority also wondered why the respondent allowed the victim to swing first.[18] A-15 n. 11.

The majority's view of the facts is incomplete. This respondent is no stranger to the criminal justice system. Indeed, he presented a virtually identical self-defense/ineffectiveness claim in connection with an earlier assault conviction.[19] *See*

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[18] The victim had been drinking. *State v. Chambers,* 714 S.W.2d at 529, (A-115-116).

[19] The conviction was affirmed on direct appeal. *State v. Chambers,* 550 S.W.2d 846 (Mo.App. 1977).

Chambers v. State, 592 S.W.2d 542 (Mo.App. 1979). Having lost that claim ultimately (*see Chambers v. State,* 623 S.W.2d 76 (Mo.App. 1981), the respondent was in a better position to see what might work the next time around.

Thus, in the case at bar, defense counsel wisely discussed the strategic decision with his client and obtained the latter's assent. What counsel did not consider, however, was the possibility that a federal court of appeals, several steps removed from the case, would substitute its own version of the facts and re-characterize counsel's performance.[20]

Finally, the majority decision placed the Court of Appeals squarely at odds with the United States Court of Appeals for the Fifth Circuit. In *Bell v. Lynaugh,* 828 F.2d 1085 (5th Cir.), *cert. denied,* ____ U.S. ____, 108 S.Ct. 310, ____ L.Ed.2d ____ (1987), as in the case at bar, defense counsel had the benefit of the record in a previous trial. *Id.* at 1090. Based upon that record, defense counsel decided not to introduce psychiatric evidence in the second trial. *Id.*

Defense counsel's actions in *Bell* are parallel to those of counsel in the instant case:

> [Defense counsel] familiarized himself with medical testimony offered by both the defense and the state during the 1974 trial prior to developing his trial strategy. The unique procedural posture provided [defense counsel] with 20/20 hindsight to know that such evidence had little, if any, effect on the juror's deliberations. He realized that the testimony of [two psychiatrists] was particularly damaging and genuinely feared that such evidence was admissible as rebuttal evidence if he placed appellant's mental state in issue.

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[20] Judge John R. Gibson was correct: the majority opinion is based upon hindsight. *Chambers v. Armontrout, supra,* A-18, slip op. at 17-18, Gibson, J., dissenting.

Id. Moreover, Bell's argument, rejected by the Fifth Circuit, was remarkably similar to that of the respondent in the case at bar:

> Appellant suggests that because the focus during the 1982 trial was on the penalty to be imposed and not on appellant's guilt, [defense counsel] was obligated to introduce psychiatric evidence because it was the only possible avenue of relief. We decline to force [defense counsel] or any other attorney to travel an avenue which they genuinely fear will lead only to trouble for their client.

Id. at 1090 n. 6.

Petitioner submits that the Eighth Circuit majority decision fails under *Strickland v. Washington, supra,* and the presumption of correctness, 28 U.S.C. §2254(d). "Catch-22" situations cannot support ineffective assistance of counsel claims where the attorney acts out of an awareness of the potential pitfalls and/or benefits of a particular course of action. Accordingly, petitioner respectfully requests this Court to grant certiorari.

CONCLUSION

Petitioner respectfully requests that the petition for writ of certiorari be granted and that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

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